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Divorce -- Modification of Custody Decree

RECENT CASES

DIVORCE—MODIFICATION OF CUSTODY DECREE*

That the welfare of the child should be the paramount concern of the court in determining custodial rights of parents in divorce proceedings is undisputed. However, the Florida Supreme Court, in a recent case[1] ignored fundamental law where on the record it clearly appeared that the interest of the child would be best served with the mother.

The facts briefly are these: the mother was successful plaintiff in a divorce action and the decree, in which the custody of the five year old daughter was divided between the contestants, was entered in April 1944. Two subsequent modifications in the custodial decree were made, the last on September 10th, 1945 when permanent custory was awarded to the father, with the right of 30 day visitation each year reserved to the mother. In July 1947, the mother petitioned for the permanent custody of the child on the basis of the following undisputed facts: that, whereas she was formerly unable to provide a permanent home for the child, her present husband then being a member of the F.B.I. with no permanent station, is now practicing law with his father in the City of Detroit, and is permanently settled there. They own their own home, and are financially and otherwise able and anxious to rear the child, and can offer it proper home environment, cultural and educational advantages.

The Hon. Ernest Mason, the very same judge who entered the decree of September 10th, 1945, heard testimony, observed the witnesses and found that the conditions of the parties had changed sufficiently for an exercise of his judicial discretion to modify the decree. He found, inter alia, that the mother could devote her full time to the child; that the father and his present wife are both employed and have little time to dedicate to the child. He found that while the legal custody was in the father, the actual custody was in the 73 year old paternal grandmother. In view of these facts, Judge Mason modified the decree of September 1945 and awarded the eight year old girl to her mother with a 30 day right of visitation to the father. On appeal, the Supreme Court reversed the modifying decree on two main grounds. The first of these grounds was that, "the same degree of discretion does not rest in the chancellor to modify custodial provisions of divorce decree as is reposed in him to enter original decree."[2]

With this there can be no quarrel. Certain it is that rights of individuals, once ascertained and judicially declared, should not be subject to the varying winds of chance and differences in judicial thought

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* Belford v. Belford, 32 So. 2d 312 (Fla. 1947).

[1] See note *, supra.

[2] See Note *, supra.

and opinion. This is especially important with respect to custodial law. Children, particularly those of tender years, should not be buffeted about like a chattel with the net result that they become maladjusted, unstable citizens, and oftimes delinquent.[3] But this is not to say that circumstances cannot so arise and be such as to warrant or even demand a modification.

As early as 1882 our Florida courts held in a divorce case, the court exercises disrretion in the chancery award of custody of minor children of the parties, reserving the power to open, alter and modify the decree in such respect from time to time.[4] Judgments respecting custody of children in divorce cases are necessarily provisional and temporary and ordinarily not res judicata in same court except as to facts before court at time of judgment.[5] There can be no question to-day but, that the father has no right of custody superior to that of the mother.[6]

The other basis for reversal was that as a matter of law "there are no sufficient changes in the circumstances of the parties to warrant the changes and modifications intended to be made by the decree from which this appeal is taken."[7] In other words the chancellor abused his right of discretion.

Just what facts are necessary to be adduced that the court would consider sufficient? What further convincing proof could be desired if the guiding principle in custodial cases, is the "welfare of the child"?[8]

Ceteris paribus, which parent, if any, has or should have a superior right? The modern social thought, and most recent legal expression, as well as statutory enactments, support the natural law . . . giving preference as to rights of custody to the mother. Justice Terrell of the Florida Supreme Court, in his usual well expressed manner, in Randolph v. Randolph,[9] said "So the ultimate test of guardianship in this state is spiritual and moral well-being of the child. . . . If there was ever a reason among civilized people why a father should have right over the mother to the guardianship of a minor child, I am unable to define it. . . . She toyed with her own life to bring it into existence, and if not totally bereft of the attributes of motherhood, she is morally, spiritually and biologically, best suited to care for it during infancy and adolescence. . . . In civilized society, no calling rises above that of motherhood and in the care of minor children, she makes her most abiding impression. In this the father is by nature a poor second."

Should the fact that the decree of September 1945 used the word "permanent" as to the custody, and failed to expressly reserve the Court's continuing jurisdiction which the earlier modified decrees contained, raise an insurmountable barrier to modification? We think

[3] For an excellent article see "Custody Incident to Divorce in Florida." 2 Miami Law Quarterly 32.

[4] McGill v. McGill, 19 Fla. 341 (1882).

[5] Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933).

[6] Randolph v. Randolph, 146 Fla. 491, 1 So. 2d 480 (1941).

[7] See Note *, supra.

[8] Stewart v. Stewart, 156 Fla. 815, 24 So. 2d 529 (1946).

[9] See Note 6, supra.

not. Minor children remain at all times wards of the Court, in custody proceedings.

It appears most inequitable that the mother was not at least granted a more favorable decree, say a three months period of visitation. She is entitled to enjoy her society for a reasonably sufficient time each year to enable her to inculcate in her mind a spirit of love, affection and respect for her mother.[10]

Courts being jealous of their jurisdiction, one wonders if the same result would have been reached had the mother remained domiciled in Florida rather than Michigan. In any event, the decision in the instant case is at variance with the great weight of authority, and cannot be reconciled with earlier Florida cases. It certainly is not in accord with modern social doctrines.

[10] Frazier v. Frazier, 109 Fla. 164, 147 So. 464 (1933). Where evidence showed neither of divorced parents had superior qualifications for exercising parental rights, modifying decree awarding custody of 11 year old female child so as to exclude father except for two weeks each year held erroneous in not permitting father child's custody for not less than three months.

TAXATION—LAND EXEMPT WHERE NO BENEFITS RECEIVED*

The Florida Supreme Court recently held that where agricultural lands included within municipal boundaries receive no benefits, direct or indirect, from the municipality other than from its water works, the enforcement of municipal taxes on the lands other than for debt service on the water works bonds may be enjoined.[1]

The effect of the principal case is that agricultural lands within a municipality are taxable only if, and to the extent that, they receive municipal benefits. This is presumably based on the minority rule that municipal taxation of property which cannot be benefited by municipal expenditures is a taking of private property for public purposes and may be enjoined.[2] In two of the small minority of states recognizing this theory it has been overruled as unsatisfactory and impracticable.[3] As was pointed out in a New Jersey case,[4] "If the matter of benefits to the

* Town of Lake Hamilton v. Hughes, 32 So. 2d 283 (Fla. 1947).

[1] See Note*, supra.

[2] Langworthy v. Dubuque 16 Iowa 271 (1864); Territory v. Daniels 6 Utah 288, 22 Pac. 159, 5 L.R.A. 444 (1889) since overruled see (before constitution adopted) Kimball v. Grantsville City, 19 Utah 368, 398, 57 Pac. 1, 45 L.R.A. 628 (1899); Town of Parkland v. Gaines, Same v. Brown, 88 Ky. 562, 11 SW 649 (1889) since overruled see Hughes v. Carl et. al., 106 Ky. 533, 50 SW 852 (1899); Morford v. Unger, 8 Iowa 82 (1859).

[3] Kimball v. Grantsville City, supra. Hughes v. Carl, supra.

[4] State (Bailey, Prosecutor) v. Brown, Collector, 53 N.J.L. 162, 20 Atl. 772 (1890).